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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 88

GULF OIL CORPORATION,

*Petitioner,*

v.

JAMES R. WESTON, ROBERT J. POWELL AND GEORGE SMITH,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.


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# INDEX

## Subject Index


| | Page |
|---|---|
| Petition for writ of certiorari | 1 |
| Statement of the case | 2 |
| Jurisdiction | 5 |
| Question presented | 5 |
| Opinions below | 5 |
| Reasons relied upon for allowance of the writ | 5 |
| Prayer for writ | 9 |
| Brief in support of petition | 10 |
| Statement of the case | 10 |
| Argument | 10 |
| Conclusion | 27 |


## Table of Cases Cited


| | |
|---|---|
| *Bagley* v. *United States*, 77 F. Supp. 260 | 7 |
| *Calvin* v. *Huntley*, 178 Mass. 29, 59 N. E. 435 | 15 |
| *Eagle, The, Federal Case*, 4233 | 12 |
| *Edwin, The*, 23 F. 255 | 12 |
| *Hughes* v. *Southern Pac. Co.*, 274 F. 876 | 7, 20 |
| *Inland, The*, 271 F. 1008 | 7, 20 |
| *Ipswich, The*, 46 F. 2nd 136 | 12 |
| *Jensen* v. *United States*, 287 F. 531 | 7, 20 |
| *Jefferson Borden, The*, 6 F. 301 | 7, 20 |
| *Larimer, The*, 174 F. 429 | 12 |
| *National Labor Relations Board* v. *Isthmian Steamship Co.*, 126 F. 2nd 598 | 8, 22 |
| *National Labor Relations Board* v. *Waterman Steamship Corp'n*, 309 U. S. 206 | 7, 20 |
| *Olympic, The*, (1913) P. 92 | 6 |
| *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31 | 21 |
| *Steel Trader, The*, 275 U. S. 388 | 10, 15 |
| *United States* v. *Barker* | 12 |

## Statutes Cited


| | Page |
|---|---|
| R. S. 4527, 46 United States Code 594 | 4, 5 |
| 28 United States Code, § 1254 | 5 |
| 46 U.S.C.A. 541 | 2 |


## Other Authorities Cited


| | |
|---|---|
| British Merchant Shipping Act of 1854, Sec. 167 | 16 |
| British Merchant Shipping Act of 1894, Sec. 158 | 16 |
| Halsbury's Statutes of England | 6 |
| Merchant Seamen and The Law, by William L. Standard, Chapter 2 | 12 |

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

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# No. 840

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GULF OIL CORPORATION,

*Petitioner,*

*vs.*

JAMES H. NEWTON, ROBERT J. POWELL AND GEORGE SMITH,

*Respondents*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.**

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*To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:*

The Petition of Gulf Oil Corporation respectfully prays that this Court shall grant a writ of certiorari to the United States Court of Appeals for the Third Circuit which affirmed a judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the Respondents and entered judgment against your Petitioner in the aggregate sum of $573.82 in a cause of action under R. S. 4527, 46 United States Code 594, which allegedly arose out of the

employment of Respondents aboard Petitioner's vessel, the Steamship "Gulfmoon".

## Statement of the Case

Under existing legislation (46 U.S.C.A. 541 et seq., originally enacted in 1872) an American vessel contemplating a foreign voyage, as contrasted with a coastwise or intercoastal voyage, must enter into a written agreement with the crew. This agreement, the shipping articles of the vessel, must be signed before an United States Shipping Commissioner who must act as a witness at both the "signing on" and "signing off" of the officers and crew. At the latter time wages must be paid and the wage accounts submitted to the Commissioner to assure that no deductions from wages have been made except those authorized by statute.

The Respondents were members of the crew of Petitioner's vessel "Gulfmoon", an ocean going tank vessel engaged in carrying petroleum products in bulk. Between April 30 and May 3, 1948 these three Respondents signed shipping articles on the "Gulfmoon" at New York City. The articles called for a voyage "from the port of New York to one or more ports in Venezuela and such other ports and places in any part of the world as the master may direct, and back to a final port of discharge in the United States, for a term of time not exceeding three calendar months".

While the vessel was at sea and for reasons which are not disclosed by this record the vessel was ordered to proceed to Harbor Island, Texas rather than to Venezuela. At Harbor Island the "Gulfmoon" loaded her cargo of crude petroleum and then returned to Petitioner's refinery at Philadelphia on May 15, 1948 where the cargo was discharged. The testimony was uncontradicted that the voy-

age to Harbor Island, Texas and return consumed slightly less than one day more than a voyage to Venezuela and return would have consumed.

When the "Gulfmoon" arrived at Philadelphia the shipping articles were terminated before the United States Shipping Commissioner and the crew members were paid for their services during the voyage. The usual procedure was followed in that the Respondents received their wages and signed off the shipping articles at the same time. At the time of the "sign off" the unlicensed members of the crew noted upon the shipping articles what was designated as a "blanket protest", the exact language of which is set out in the margin.[1]

The Petitioner, desiring to continue all the crew members in its employ, opened shipping articles for another voyage of the vessel contemporaneously with the process of signing off. The mechanics were that the Shipping Commissioner sat at one end of a table and witnessed the signing off. A Port Captain for Petitioner sat at the same table with the new articles and each man was invited to continue in Petitioner's employ. Nineteen men signed the new articles and ten, including the Respondents, refused.

The record is clear that the men knew they were not "fired" and that they could continue in Petitioner's employ.

> "Q. And you weren't fired?
> A. No, not fired. (Smith, 20a)

* * *

[1] "Phila Pa 5-15-48 Blanket protest by each member of the Unlicensed Personnel of the SS "Gulfmoon", the payoff of the SS "Gulfmoon" on the 15th of May 1948 is protested by each member of the Unlicensed Personnel due to the vessel not completing shipping articles; that is, foreign articles were signed in New York N Y on the 30th of April 1948 for one or more ports in Venezuela etc (see face of shipping articles) and ship made voyage to Harbor Island, Texas and back to Philadelphia, Pa instead.

"EDWARD C. BEHL
*"Dpy Ship Comm."*

"Q. You knew that you were entitled to sign right back on that ship the same day, the same hour, that you signed off one set of articles, didn't you?
A. If I so wished. (Smith, 20a)"

The Respondents left the vessel after the pay-off and subsequently instituted suit on the admiralty side of the United States District Court for the Eastern District of Pennsylvania demanding that Petitioner pay each of them an additional month's wages under R. S. 4527, 46 U. S. C. A. 594. This statute reads as follows:

"§ 594. *Right to wages in case of improper discharge*

Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned."

After hearing the evidence the District Court held that the Respondents had been "improperly discharged" by Petitioner within the meaning of the statute and awarded each of the Petitioners one month's wages with interest from the date they had left the vessel. 87 F. Supp. 210. The Court of Appeals affirmed, 180 F. 2nd 491 (Advanced Sheets for April 24, 1950). The Court of Appeals held that the word "discharge" as used in the statute means "the termination of the contractual obligations of a given set of articles", and further held that "discharge" and "signing off" the shipping articles are synonymous terms within the contemplation of the statute.

## Jurisdiction

The present proceeding is within the admiralty and maritime jurisdiction of the Courts of the United States. The jurisdiction of this Honorable Court to entertain the present petition and to grant the same is provided by § 1254 of Title 28, United States Code.

## Question Presented

Where a seaman had signed shipping articles and the articles are terminated before he has earned a month's wages, is the seaman entitled to an additional month's wages under R. S. 4527, 46 U. S. C. A. 594, merely by signing off the articles for the voyage in question and noting a protest notwithstanding that the shipowner offered to retain the seaman in its employ aboard the same vessel under exactly the same provisions as to pay, position, and working conditions, which offer was declined by the seaman?

## Opinions Below

The Opinion of the District Court is reported at 87 F. Supp. 210. The Opinion of the Court of Appeals is reported at 180 F. 2nd 491 (Advanced Sheets for April 24, 1950).

## Reasons Relied upon for Allowance of the Writ

1. The Court of Appeals has decided an important question of maritime law arising under an United States Statute which has not been, but should be, settled by this Honorable Court. In its decision the Court of Appeals has reached a result which has far reaching implications in the actual operation of merchant shipping.

This Court has never directly passed upon the fundamental problem of the circumstances which make for lia-

bility under the statute. The Court of Appeals has held that liability arises under circumstances which are an everyday occurrence in the shipping industry and the implications of its decision place vessel owners in the position of being faced with multiplied wage liability which is completely unjustifiable and contrary to the purpose of the statute.

2. The Court of Appeals has construed the word "discharge" in the statute in a manner which does violence to the plain meaning of the word, is inconsistent with the obvious purpose of the statute and ignores the meaning given this same word by a British decision in a case arising under the British Statute which was the source of R. S. 4527.

The Court of Appeals has decided that the word "discharge" as used in the statute, means simply "the termination of the contractual obligations of a given set of articles" and that the word is synonymous with the words "signing off". Actually the termination of a given set of articles and the attendant "signing off" by the crew members are but routine events in the over-all pattern of continuing employment which prevails in the shipping industry today and which frequently persists through many successive sets of shipping articles. The obvious purpose of the statute was to protect the seaman from being "fired" without his consent and without fault on his part before he had had an opportunity to earn a month's wages.

Halsbury's Statutes of England notes *The Olympic*, (1913) P. 92, as the leading case interpreting the English counterpart of R. S. 4527. That decision squarely supports Petitioner's contention and since R. S. 4527 is derived from the English Act, *The Olympic* decision is entitled to careful consideration in any effort to determine the proper interpretation of R. S. 4527.

3. The Court of Appeals in deciding the case at bar has interpreted the word "discharge" as used in the statute in a manner which is in conflict with every other interpretation of this same statute by Courts of the United States for more than 75 years.

The statute has been interpreted and applied in several cases. In each the master had severed the employer-employee relationship under circumstances which amounted to wrongful discharge of the seaman from his employment. *The Jefferson Borden,* 6 F. 301; *Hughes* v. *Southern Pac. Co.,* 274 F. 876; *The Inland,* 271 F. 1008, affirmed 279 F. 1018; *Jensen* v. *United States,* 287 F. 531; *Bagley* v. *United States,* 77 F. Supp. 260.

No case has given to the statute an interpretation similar to that given by the Court of Appeals in the case at bar. In the present case the employer did not even attempt to sever the employer-employee relationship. On the contrary, Petitioner offered to retain these Respondents in its employ aboard the same vessel, in the same capacities and at the same rates of pay to which they had previously been entitled. It was the voluntary act of Respondents which severed the employer-employee relationship.

4. The Court of Appeals has construed the word "discharge" contained in the statute in a manner which is in direct conflict with the rationale of cases heretofore decided by this Honorable Court and in conflict with a previous decision by the Court of Appeals for the Second Circuit.

*National Labor Relations Board* v. *Waterman Steamship Corporation,* 309 U. S. 206, *and Southern Steamship Company* v. *National Labor Relations Board,* 316 U. S. 31, are decisions by this Court which hold that the mere formality of signing off shipping articles does not terminate the employer-employee relationship. The Court of Appeals for the Second Circuit has enunciated this same rule

in *National Labor Relations Board* v. *Isthmian Steamship Company,* 126 F. 2nd 598.

The decision by the Court of Appeals in the case at bar cannot logically be reconciled with these decisions. These holdings by this Court that the formality of signing off shipping articles did not sever the employer-employee relationship were not mere dicta, but were actual holdings by this Court which were essential to the decision of those cases.

5. The decision by the Court of Appeals has placed such a novel interpretation upon the word "discharge" as used in the statute that it has reached a result which is completely impractical and which is at actual variance with practice in the industry and under the labor relations contract existing between the Petitioner and the Union of which Respondents are members.

In this day of modern shipping it is completely impractical to hold that there has been a "discharge" within the meaning of the statute simply because the crew of a vessel has "signed off" a given set of shipping articles. If this be the proper meaning of the word "discharge", then every shipowner who completes a round trip foreign voyage and discharges his cargo in less than thirty days must pay to each crew member not only the wages which he has already earned but also an additional month's wages. Under the decision of the Court of Appeals this windfall will inure even to the benefit of those crew members whose actual employment has never ceased for a moment and who remain upon the vessel for subsequent voyages in the same positions, at the same rates of pay and subject to exactly the same working conditions. That this result is unnecessary and unjustifiable, and was never contemplated by the parties, is demonstrated by reference to the provisions of

the labor relations contract existing between Petitioner and the Union of which Respondents are members.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its Docket No. 10,056, *James H. Newton, Robert J. Powell and George Smith* v. *Gulf Oil Corporation,* and that the judgment of the said Court may be reversed by this Honorable Court and that your Petitioner may have such other and further relief as may be just in the premises.

Respectfully submitted,

GULF OIL CORPORATION,
*Petitioner.*

By THOMAS E. BYRNE, JR.
*Counsel for Petitioner.*

MARK D. ALSPACH,
*Of Counsel.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the United States Supreme Court:

### Statement of the Case

A statement of the case has already been given in the Petition and for purposes of brevity it will not be repeated here.

### Argument

*The Court of Appeals has decided an important question of maritime law arising under an United States Statute which has not been, but should be, settled by this Court; and in its decision the Court of Appeals has reached a result which has far reaching implications in the actual operation of merchant shipping.*

The only occasion on which this Honorable Court has passed directly upon the interpretation of R. S. 4527 was in the case of *The Steel Trader,* 275 U. S. 388. That case decided only the limit of the shipowner's liability under the statute. The case at bar presents the more important fundamental problem: Under what circumstances does the liability arise in the first instance?

It would be difficult to overstate the practical importance to the shipping industry of the problem which this case presents. The statute in question was enacted in 1872. Progress in vessel construction and communications since 1872 has made it commonplace for ships to complete round trip foreign voyages in less than one month. They are always able to communicate with their home ports. Prior to the decisions below in the case at bar there was no precedent for a claim, let alone an award, for a month's wages in

addition to the wages earned by reason of a seaman's signing off shipping articles at the termination of a voyage lasting less than one month.

It must be remembered that the decision of the Court of Appeals does not turn upon the insignificant deviation in the vessel's itinerary. Indeed, such deviations are common occurrences in the actual operation of the Merchant Marine. They are necessitated by the exigencies of the trade from which seamen and shipowners alike derive their livelihood. The decision of the Court of Appeals does turn upon the fact that the crew signed off shipping articles and the Court held that this act constituted a "discharge" of the seamen under R. S. 4527. The statute does not give a remedy for every breach of contract but only for "improper discharge." Petitioner does not dispute that if the Respondents can show damage by reason of the deviation, they have a cause of action for breach of contract in another suit.

To Petitioner the liability imposed upon it by the decision below cannot be reconciled with either reason or statutory intent. Its logical result is that whenever an American vessel completes a foreign voyage of less than one month's duration, the crew may recover their earned wages plus a penalty equal to one month's wages. This applies not only to those crewmen who choose to leave the employ of the vessel but also to those men who remain on her during her stay in port and make the next voyage, because they too have signed off the shipping articles. If that act be the "discharge" which makes for liability, and the Court below has so held, then it can make no difference whether a particular man stays or leaves. He has been "discharged", and is entitled to the penalty.

Foreign competition makes operation of American vessels difficult enough without imposing another substantial

burden by judicial fiat. The rule enunciated by the Court below applies only to foreign commerce where other nations can compete freely.

The importance to American shipping of the question of when a vessel reaches its "final port of discharge" is self-evident. Always heretofore that term had been considered to refer to the port where the last of the vessel's cargo was finally discharged. That interpretation probably had its origin in § 6 of the Act of July 20, 1790 which provided "that as soon as the voyage ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall then be due according to his contract; . . .". See *The Eagle*, Federal Case 4233. Mr. Justice Story, speaking of when seamen were discharged under shipping articles said:

> "But, here, the words are 'final port of discharge', so that the owner had a right to order the ship from port to port, until there was a final discharge of the whole cargo."

Of the construction which he placed upon the articles Justice Story said:

> "This construction is, as far as we know, the same which has been uniformly put upon these words, both in shipping articles and policies of insurance." *United States* v. *Barker*, Federal Case 14516.

Other cases to the same effect are *The Edwin*, 23 F. 255, *The Larimer*, 174 F. 429, and *The Ipswich*, 46 F. 2nd 136.

The National Maritime Union, probably the largest of the seamen's unions, has published and distributed a booklet *Merchant Seamen And The Law* by William L. Standard.

Discussing wages in Chapter 2 of that volume Mr. Standard says:

> "Final port of discharge refers to that place in the United States where the cargo or ballast is to be finally discharged."

The Court of Appeals ignored these prior interpretations of the meaning of the language in the shipping articles and apparently assumed that this language refers to discharge of the crew, presumably in support of its own interpretation of the meaning of the word "discharge" in R. S. 4527. This erroneous assumption by the Court below only serves to illustrate the fallacy of failing to recognize the varying connotations of the word "discharge" depending upon the context in which it is used.

> *The Court of Appeals has construed the word "discharge" in the statute in a manner which does violence to the plain meaning of the word, is inconsistent with the obvious purpose of the statute and ignores the meaning given this same word by a British decision in a case arising under the British Statute which was the source of R. S. 4527.*

The statute under which Respondents brought suit provides a remedy for a seaman who has been "improperly discharged", "without fault on his part", and "without his consent". It is Petitioner's position that these Respondents were never "discharged" within the meaning of the act; much less were they "improperly discharged".

At the very outset of this discussion, Petitioner would like to deal with one of the circumstances of this case which is clearly irrelevant to the underlying problem, but which may nevertheless tend to obscure the real issue. We refer to the fact that the shipping articles signed by the Respondents referred to a voyage

> "To one or more ports in Venezuela and such other ports and places in any part of the world as the Master

> may direct, and back to a final port of discharge in the United States, for a term of time not exceeding three calendar months."

In point of fact, the vessel's sailing orders were changed after the articles were signed. The vessel proceeded to Harbor Island, Texas instead of Venezuela and ultimately returned to Philadelphia to discharge her cargo. However, it is undisputed on the record that the voyage actually taken lasted longer, by a period slightly less than one day, than a voyage to Venezuela and return would have lasted.

This deviation can have but the slightest technical implication. The statute under which suit was brought was plainly never intended to recompense a seaman simply because of a change in the vessel's itinerary. The statute speaks only of compensation for the damage sustained by the seaman by reason of the *untimely termination* of his employment under the circumstances enumerated in the act.

It is clear that no cause of action under this particular statute accrued to the Respondents simply by virtue of the change in the vessel's itinerary. The amount of wages they received at the end of the voyage was, if anything, slightly enhanced as a result of this change. If there was any technical breach of the contract embodied in the Shipping Articles by reason of the deviation, the Respondents may have a remedy in another action,[2] but they certainly have no cause of action on that account under R. S. 4527.

It is therefore apparent that the fact of a deviation from the description of the voyage contained in the Shipping Articles can be no more than a circumstance without legal

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[2] That the members of the crew suffered any damage by reason of this deviation is highly improbable when it is considered that they went to a port in Texas, rather than to one of the notoriously filthy oil ports on the Caribbean Coast of Venezuela.

significance as far as the present problem is concerned. Indeed, the fact of deviation does not appear to have entered into the *ratio decidendi* of the Court of Appeals. Although the Court of Appeals adverts to the deviation in the course of its Opinion, it is clear that its construction of the language of the statute did not depend upon that fact.

The decision of this case turns upon the construction of the word "discharge", and the phrase "improperly discharged" as employed in R. S. 4527. The Court of Appeals so stated the problem and Petitioner agrees. However, the Court of Appeals held that "discharge" means the termination of the contractual obligations of a given set of Articles, and that "discharge" and "signing off" must be synonymous terms. With these conclusions Petitioner strenuously disagrees. Furthermore, as we shall point out later, even if the first definition enunciated by the Court of Appeals be accepted, then there was no "discharge" of the Respondents in the case at bar.

It is Petitioner's position that the word "discharge", as used in R. S. 4527, means the severance by the employer of the employer-employee relationship and that relief can be granted the seaman-employee where this severance has been without his consent and without fault on his part. It contemplates that the employee has been placed in a position where his opportunity to earn wages from that employer has been either interrupted or finally terminated.

Our contention as to the meaning of the word "discharge" is fortified by the decision of the Supreme Court of Massachusetts in *Calvin* v. *Huntley,* 178 Mass. 29, 59 N. E. 435, cited and quoted with approval by this Court in *The Steel Trader,* 275 U. S. 388. The Massachusetts Court said, in referring to R. S. 4527, at 178 Mass. 32:

> "It speaks not of punishment, but of compensation; *its object is to protect the seaman from loss* rather

> than to punish the master for discharging him. . . . We think the statute not penal but remedial." (Emphasis supplied.)

This statement of the manifest purpose of the statute certainly indicates that the word "discharge" does not have the artificial meaning ascribed to it by the Court of Appeals in the case at bar. Under the facts of our case, no "loss", in the financial sense, could possibly have accrued to the Respondents by the fact of their signing off the shipping articles. If the purpose of the statute be, as the Massachusetts Court put it, "remedial", then that purpose has not been served in the instant case, for there existed no situation which required any remedy.

Petitioner has made a diligent search of the legislative history of R. S. 4527. Our reseach can add nothing to the legislative history referred to by this Court in *The Steel Trader, supra.* As is indicated in the opinion in *The Steel Trader,* R. S. 4527 was one of 68 sections contained in the Act of June 7, 1872. This entire piece of legislation, in turn, was based upon the British Merchant Shipping Act of 1854. Section 167 of the British Act of 1854 furnished the text of R. S. 4527.

Section 167 of the British Act of 1854 was substantially re-enacted by Section 162 of the British Merchant Shipping Act of 1894. One British decision under the Act of 1894, *The Olympic,* (1913) P. 92, has interpreted the meaning of the word "discharge" in accordance with Petitioner's present contention and in a manner which is directly contrary to the interpretation of the Court of Appeals in the case at bar.

*The Olympic, supra,* involved an action for wages by members of the crew of a vessel which had suffered a casualty. The Court concluded that the crew members were not entitled to wages beyond the date of the casualty

under Section 158 of the British Merchant Shipping Act of 1894, which section contains provisions similar to R. S. 4526, 46 U. S. C. A. 593. In reaching this conclusion, Buckley, L. J. had occasion to observe (at (1913) P., pages 106-107):

> "Looking at the Merchant Shipping Act, 1894, I find that there are two sections which seem to me to deal with different subject matters. The one is s. 162, which uses the word 'discharged', meaning, as I understand it, not 'paid off', but 'dismissed'. It is a section which reproduces s. 167 of the Merchant Shipping Act, 1854, upon which *Tindle* v. *Davison* was decided, but without some words in which the expression 'so improperly discharged' occur. Those words no doubt make the point more plain, but in my judgment the true construction of the present section is the same. The present section speaks of 'without fault on his part justifying that discharge'. This s. 162 deals with the case where a seaman is discharged, that is, dismissed, otherwise than in accordance with the terms of his agreement, and, under circumstances, confers upon him a right to a month's wages. This section is one dealing with the case of the employer dismissing the seaman without fault on the part of the seaman, and without the seaman's consent. The other section is s. 158, and the verb there is 'terminates'. The section applies in an event, namely, 'where the service of a seaman terminates', and deals with that event in two aspects . . .".

Petitioner does not contend that the foregoing statement of the British Court, insofar as it applies to Section 162 of the British Act, represents the holding of that case. However, we do submit that this expression of opinion by the British Court of recognized authority is entitled to a great deal of respect and consideration, especially in the absence of precedent to the contrary.

The plain language of R. S. 4527 itself compels the conclusion that "discharge" means the end of a tenure of employment, rather than the mere completion of one voyage evidenced by the termination of a particular set of shipping articles. The word "discharge", when applied to the employer-employee relationship, has a commonly accepted meaning in every day usage with which the Congress which enacted R. S. 4527 must necessarily have been familiar. This word contemplates, in the colloquial, the "firing" or "dismissal" of the employee by the employer. We can think of no more appropriate or accurate word, sufficiently dignified for statutory usage, which Congress could have utilized to convey this meaning.

It is true that the word "discharge", as used in other sections in the Act of June 7, 1872, connotes simply the "signing off" of a crew member from a given set of Articles. The mathematical preponderance of these instances proves nothing in and of itself for this meaning in other sections of the statute arises solely by reference to the context in which the word appears. By the same token, the context of R. S. 4527 compels the conclusion that "discharge" does not mean simply "signing off".

If all that is necessary to confer a right of action under R. S. 4527 is that the crew member be "signed off" without his consent and without his fault before he has earned a month's wages, it would certainly seem that the Congress would have so stated in so many words. The qualifications enumerated in the act—"without fault on his part justifying such discharge, and without his consent", clearly bespeak the circumstances surrounding a "firing", rather than those surrounding the perfunctory mechanical act of signing off a set of articles. Indeed, the application of this qualifying language to the latter situation is anomalous. Where, as in the case at bar, the voyage came to an end, and the entire

crew signed off, it is difficult to see what bearing the fault, or lack of it, on the part of an individual crew member could have upon the happening of that event.

*The Court of Appeals in deciding the case at bar has interpreted the word "discharge" as used in the statute in a manner which is in conflict with every other interpretation of this same statute by Courts of the United States for more than 75 years.*

An examination of the cases decided under R. S. 4527 reveals that in no instance has that statute ever been construed in the manner in which the Court of Appeals construed it in the case at bar. It is likewise clear that although this act has been on the statute books for more than three-quarters of a century, never before has there been an attempt to claim liability under R. S. 4527 upon facts which are analogous with the present case.

In each case where a court has construed the statute, there has been positive evidence of affirmative action by the master of the vessel actually terminating the employment relationship. Where there has been any question of the intention of the master to sever this relationship the courts have concluded that the act did not apply.

Although the decision of the District Court in *The Steel Trader,* 10 F. 2nd 248, was reversed, 275 U. S. 388, the District Court, at 10 F. 2nd 252, cites all of the cases where R. S. 4527 had been cited, mentioned or construed up to the date of that decision (1925). A number of these cases are not germane to the issue here. In those which are relevant it seems to be universally accepted that the element of wrongfulness is read into the statute so as to modify the word "discharge". That the signing off of a crew member at the termination of a voyage might be wrongful *per se* or actionable under R. S. 4527 has never been suggested.

We shall not attenuate this brief by discussing the facts of the relevant decisions. Suffice it to say that none of them has applied to the statute or even suggested an interpretation similar to that given to it by the Court of Appeals in the case at bar. *The Jefferson Borden,* 6 F. 301; *Hughes* v. *Southern Pacific Co.,* 274 F. 876; *The Inland,* 271 F. 1008, affirmed 279 F. 1018; *Jensen* v. *United States,* 287 F. 531; *Bagley* v. *United States,* 77 F. Supp. 260.

*The Court of Appeals has construed the word "discharge" contained in the statute in a manner which is in direct conflict with the rationale of cases heretofore decided by this Honorable Court and in conflict with a previous decision by the Court of Appeals for the Second Circuit.*

In *National Labor Relations Board* v. *Waterman Steamship Corporation,* 309 U. S. 206, this Court was considering the question of discharge of seamen. In that case Waterman had a contract with the Union which we shall here refer to as "Seamen's". Some of Waterman's employees were apparently members of another Union which we shall refer to as "Maritime". Waterman's contract with Seamen's provided that vacancies should be filled by members of Seamen's Union. Those crew members who belonged to Maritime signed off shipping articles and Waterman contended that they had been discharged by the act of signing off articles and attempted to replace them with members of the Seamen's Union.

When charges of unfair labor practice were brought against Waterman the Company took the position that when the crew of its vessel received their wages and signed off the statutory shipping articles the men were no longer in its employ; that it had to replace them and in so doing it had to honor its contract with Seamen's. This Court held that there was in fact a continuing tenure of employment,

independent of the shipping articles and subject to termination in a manner other than by the mere expiration and signing off the shipping articles. It also held that the custom in the industry was pertinent and established that the relationship of the seaman to his vessel and his employment was not terminated simply by the expiration of articles.

This Court reaffirmed its holding in the *Waterman* case in *Southern Steamship Company* v. *National Labor Relations Board,* 316 U. S. 31. There the employer contended, *inter alia,* (316 U. S. at 37) "that the employment of the seamen involved automatically terminated when they signed off the shipping articles in Philadelphia, so that they cannot be said to have been 'discharged'." This Court said that this argument was without substance and that "The tenure of their employment must be determined in the light of all the evidence concerning Petitioner's employment customs and practices." (316 U. S. at 37, 38).

Before leaving the subject of *Southern Steamship Company* v. *National Labor Relations Board, supra,* it is interesting to note that the Court of Appeals for the Third Circuit when that case was before it had this to say (120 F. 2nd 505, 508):

> "In the present case the Board found that the tenure of employment of the company's seamen was not terminated by the *mere expiration of shipping articles.* This finding is fully supported by the evidence that new articles are ordinarily signed as the old articles are signed off and that in any case the seamen consider themselves engaged for the new voyage unless notified to the contrary. In this connection it is quite significant that the captain and other ship's officers in their testimony referred to the five men as having been *'discharged' or 'fired'.* All five had been previously employed for periods varying from six weeks to eighteen months. We find no error in the Board's conclusion that *they remained employees after the expiration of*

*the voyage and that they were discharged by the company.''* (emphasis supplied)

The Court of Appeals for the Second Circuit was dealing with a similar problem in *National Labor Relations Board* v. *Isthmian Steamship Company,* 126 F. 2nd 598. In that case the crew members signed off the articles and were paid on the dock. Later they returned aboard the vessel. Thereafter the acts giving rise to that litigation occurred and the crew which had signed off was displaced by another. Charges of unfair labor practice were brought against the shipowner. The Second Circuit held that:

> ''When they returned to the ship after being paid off that afternoon they were still members of the crew and the respondent's acquiescence in their ejection from the ship and the hiring of men to replace them amounted to their discharge.'' (at 126 F. 2nd 600.)

This makes it plain that some positive act on the part of the shipowner in addition to the mere signing off the articles was required before there had been a ''discharge'' of the crew.

The result reached by the Court of Appeals in the case at bar cannot be reconciled with the rationale of the above decisions by this Court and the Court of Appeals for the Second Circuit. Furthermore, in reaching its conclusion the Court below in our case plainly ignored the expressions by this Court that the established custom and practice within the industry are most relevant in resolving a problem of the type here presented.

In *National Labor Relations Board* v. *Waterman Steamship Corporation, supra,* and *Southern Steamship Company* v. *National Labor Relations Board, supra,* this Court held that the employer-employee relationship survived the termination of the voyage and the signing off of the crew. Nothing in these opinions suggests that any of the incidents of that

relationship, including the right of the employee to earn wages,[3] was in any way disturbed until some subsequent action on the part of the employer resulted in the "discharge" of the crew members.

The Court of Appeals in the case at bar has failed to recognize the full import of these decisions or else it has incorrectly limited their application. It cited these cases only for the proposition that "certain duties imposed by labor relations legislation survive the termination of shipping articles". What the Court of Appeals failed to recognize is that one of these duties is that of the shipowner to retain the crew members in its employ; that from this duty sprung the concomitant right of the crew member to continue to receive wages; and that under these circumstances the perfunctory act of signing off one set of shipping articles was of no more practical significance than signing one's name to a receipt for a wage payment.

> *The decision by the Court of Appeals has placed such a novel interpretation upon the word "discharge" as used in the statute that it has reached a result which is completely impractical and at actual variance with practice in the industry and under the labor relations contract existing between the Petitioner and the Union of which the Respondents are members.*

Under the reasoning of the Court below a cause of action under R. S. 4527 accrued the moment the members of the crew signed off the shipping articles. If this be true, then it follows, logically and inevitably, that a similar cause of

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[3] That the right to earn wages persisted after the termination of the voyage and the signing off of the crew members is clearly evidenced by the relevant provision of the N.L.R.B. Order which was enforced by this Court in each case. Waterman was ordered, *inter alia*, *"to make whole"* the aggrieved employees (309 U. S. 206, 210 Footnote 4); Southern was ordered, *inter alia*, to "reinstate with back pay" the crew members who had been discriminated against (316 U. S. 31, 36). The affirmation of the Board's order to "reinstate" rather than "rehire" is, we think, significant.

action accrued to every man who signed off under protest,[4] Nineteen of the twenty-nine men who signed off the articles under protest continued in the Petitioner's employ while the vessel was in port, signed articles for the next voyage and sailed with the vessel. The employer-employee relationship between Petitioner and these men never ceased for an instant, yet if the reasoning of the Court below be correct these men were also discharged and are entitled to the same award made to the Respondents. The Court of Appeals does not face this problem created by its decision and merely comments that it will do so when that particular case comes before it. We can see no defense to claims by the nineteen men who continued in the employ of Petitioner. We cannot see that R. S. 4527 was ever intended to bring about such a result and we can see no useful purpose which is served by construing it so to do.

The Court of Appeals concluded that "discharge" meant "the termination of the contractual obligations of a given set of articles". Such a definition is much too technical and obviously functional. Even should it be adopted, however, there was no "discharge" of the Respondents in the case at bar.

The Petitioner is and for a number of years has been a party to a collective bargaining agreement with the National Maritime Union of America. That contract provides, *inter alia:*

> "Section 22. Continuous Employment: Members of the unlicensed personnel may remain continuously in employment on the same vessel provided that both the Company and the member desire such employment to continue." *Article 1, § 22.*

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[4] The protest only shows the alleged lack of "consent". It should be noted that the protest is not against any alleged discharge but because the vessel went to Texas and not to Venezuela.

Petitioner's obligation under this Section was not illusory as may appear at first blush. Article 1, § 9 of this same contract provided, in part:

> ". . . Recognizing the necessity for discipline on board company vessels and at the same time in order to protect an employee against losing his job unfairly, the Company agrees to post on the bulletin board of each vessel a list of rules which shall constitute cause for which members of the unlicensed personnel may be *discharged* without further notice.
>
> "(b) For other offenses not on the posted list, members of the unlicensed personnel shall not be *discharged* without first having been notified in writing that a repetition of the offense will make them liable to *dismissal* . . ." (emphasis supplied).

Pursuant to this latter Section, there was appended to the contract a list of 17 specific offenses, prefaced by the following remarks:

> "In accordance with Article I, Section 9 of this Agreement, the following offenses shall constitute cause for which members of the unlicensed personnel may be *discharged* without further notice:" (emphasis supplied.)

At the conclusion of the aforementioned list of offenses, the following statement appears:

> "For other offenses not on the above list, an employee shall not be *discharged* without first having been notified in writing that a repetition of the offense will make him subject to *dismissal.*" (emphasis supplied.)

It seems very clear that the Respondents here had the right to remain continuously in Petitioner's employ notwithstanding the fact that a given set of articles or a particular voyage terminated. These rights were qualified only to the extent indicated in the collective bargaining

agreement. The Petitioner did not assert that it was dismissing the Respondents for any of the causes enumerated in the contract. It had no right to dismiss them otherwise. On the contrary it attempted to continue them in its employ and it was the Respondents' voluntary act which severed the employment relationship both under the collective bargaining agreement and the *Waterman* and *Southern Steamship Company* cases heretofore cited.

The provisions of the contract and the two decisions last referred to demonstrate that the employment relationship still continued. It survived the termination of the shipping articles and it continued until the Respondents performed the further act which severed it just as in *National Labor Relations Board* v. *Isthmian Steamship Company, supra,* a similar relationship continued until the shipowner performed the act which severed the relationship. In passing it is interesting and significant to note the rather obvious meaning of the word "discharge" in the Union Agreement. It is a recognition by persons in the industry that the word has varying connotations dependent in each case upon the context.

We think it worthwhile to note that the collective bargaining agreement has accomplished the purpose for which R. S. 4527 was enacted. The agreement furnishes a larger measure of practical protection than the act and removes the considerations which must have motivated the legislative policy behind R. S. 4527. Cf. *Calvin* v. *Huntley, supra.*

Petitioner does not contend that the existence of this labor contract should of itself be determinative of the case at bar. However, this and similar contracts pervade almost every aspect of the maritime employer-employee relationship and, as between the contracting parties, comprise a body of law which both are bound to respect. This being the case, the provisions of the labor contract are certainly relevant to the present problem and any tribunal which overlooks

their significance in resolving a problem arising out of the employer-employee relationship is unjustifiably ignoring the facts of industrial life. If the quoted provisions of the labor relations contract be considered, there would appear to remain no reason for the Court of Appeals to construe R. S. 4527 in the manner in which it did.

## Conclusion

We respectfully urge upon this Court the importance of the problem presented by this case and the urgent need for a decision by this Court upon the subject. The problem is by no means illusory nor confined to the parties. Other similar claims against Petitioner and other companies are in definite prospect.[5]

It is not a sufficient answer to refer to the traditional doctrine that seamen are Wards of The Admiralty. Whether that is an outmoded concept or not, it seems to have been used by the Court below to bolster a decision which was not very firm upon its main ground. We have never understood that the Wardship Doctrine was to be used as an offensive sword to force an inequitable result.

The Petition should be granted.

Respectfully submitted,

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[5] It is an interesting but unexplained fact that these claims are all made in Philadelphia. Although New York and other ports have large volumes of shipping and similar changes of itinerary, no claims of this nature have been pressed outside Philadelphia. This information has been obtained by Petitioner and its counsel through its contacts in the industry. No official source is available.